***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21528

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ROBERT WATTS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee

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Appeal from a Judgment of the United States District Court for the District of Columbia

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Joseph Forer
711 14th St. N. W.
Washington, D. C. 20005
Attorney for Appellant
(Appointed by this Court)

## QUESTIONS PRESENTED

1. Whether in a prosecution for making a threat against the President of the United States the evidence was sufficient to show that appellant's remarks constituted a threat.

2. Whether the conviction violated the First Amendment.

3. Whether the conviction was precluded by a prior judicial determination, operating as a collateral estoppel, that what the government's witnesses had heard appellant say was not a threat.

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## Constitution, Statutes and Rule

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21528

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ROBERT WATTS,

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# BRIEF FOR APPELLANT

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## JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the District of Columbia entered on December 1, 1967, convicting appellant of making a threat against the President of the United States in violation of 18 U. S. Code §871. The notice of appeal was filed on December 1, 1967, as was an order of the trial court authorizing appeal without prepayment of costs. The District Court had jurisdiction under 18 U. S. Code §3231 and D. C. Code §11-521. This Court has jurisdiction under 28 U. S. Code §§1291 and 1294 and D. C. Code §11-321.

## STATEMENT OF THE CASE

On September 12, 1966, appellant, Robert Watts, was indicted under 18 U. S. Code §871 on a charge that on August 27, 1966, he "knowingly and willfully, and in the presence of Paul Freeburger and Carroll Shoemaker, did make an oral threat to take the life of, and to inflict bodily harm upon the President of the United States in the verbal use of threatening language substantially as follows, that is: 'If they ever make me carry a rifle, the first man I want to get in the sights of the barrel is LBJ.'"

Appellant moved to dismiss the indictment on the ground that it did not state facts sufficient to constitute an offense against the United States. Judge Gasch denied the motion on October 7, 1966.

Appellant was tried before a jury on September 14, 18 and 19, 1967, Judge Burnita Shelton Matthews presiding. The government's witnesses to the alleged offense were Freeburger (Tr. 16) and Shoemaker (Tr. 54), the individuals named in the indictment as the persons in whose presence the alleged threat was made. The defense called one witness, James G. Wieghart (Tr. 104), who had also heard appellant's remarks.

Appellant moved for a judgment of acquittal at the close of the government's case (Tr. 90-97) and again after both sides rested (Tr. 111). The motions were denied (Tr. 102, 111). The jury returned a guilty verdict (Tr. 158). A renewed motion for judgment of acquittal was made within five days after verdict, pursuant to Rule 29(b), Fed. Rules Cr.

Procedure, and was denied. The court suspended imposition of sentence and placed appellant on probation for four years.

The evidence at the trial showed the following.

On the afternoon of Saturday, August 27, 1966, a "W. E. B. DuBois Club Rally" was held at the Sylvan Theater on the Washington Monument grounds, under a permit from the United States Park Police. Several discussion groups met in different places on the lawn. One of the groups, discussing the subject of police brutality, included from 15 to 40 persons, mostly in their late 'teens or early twenties. The meeting was open to the public. Among those who attended the discussion on police brutality were Freeburger, an investigator for the Army Counter Intelligence Corps, Shoemaker, a detective sergeant of the United States Park Police, Wiegart, a reporter for the Milwaukee Sentinel, and appellant. (Tr. 19-20, 30, 54-56, 59-61, 104-05.)

During the discussion, a participant said something to the effect that "we should have a better education before we get involved in things of this nature" (Tr. 22). Appellant, aged about 18 (Tr. 63), raised his hand and was recognized by the chair (Tr. 25). He then made the remarks from which the indictment derives.

According to Freeburger, appellant said (Tr. 35):

> "They always holler at us to get an education but I just received my draft classification as 1-A and have to report this Monday coming for my physical. I am not going. If they ever make me carry a rifle the first person I want to get in my sights is L. B. J. They are not going to make me kill my black brothers."

According to Shoemaker, appellant said (Tr. 61-62, 56, 75-76):

> "I'm going to report for the military service next week. If accepted, I will not serve, and if they force me to serve and give me a rifle, one of the first ones that I would want [or, I would like to have] in the sights at the end of the barrel would be 'L. B. J.'"

Shoemaker testified that appellant also said that "he didn't want to shoot his black brothers, or words to that effect" (Tr. 75). Shoemaker also testified that when appellant finished speaking he made a gesture as if he were looking down the sights of an imaginary rifle (Tr. 70, 74).

According to Wieghart, appellant said, in substance (Tr. 106):

> "... that he did not think that Negroes ought to serve in Vietnam to shoot Vietnamese. He didn't think black men should look down the barrel of a rifle to kill Vietnamese. He said that rather than looking down the barrel of a rifle to kill Vietnamese people he would rather look down a rifle aimed at the President."

After appellant made his remarks, persons in the audience laughed and applauded (Tr. 36, 66, 107). Nobody left the meeting at that time, and the discussion continued (Tr. 36-37, 31, 65-66). The group eventually agreed on proposals for better training for police, monitoring police activities, and establishment of police advisory boards (Tr. 32-33).

On the following day, August 28, 1966, a Secret Service Agent arrested appellant (Tr. 84).

In support of his motion for a judgment of acquittal, appellant introduced a transcript (D. Ex. 2; Tr. 103) and docket entries (D. Ex. 3; Tr. 103) of a proceeding against him in the District of Columbia

Court of General Sessions. This evidence was not seen by the jury. It showed the following.

On August 27, 1966, Freeburger reported to Geiglein, Special Agent in charge of the Washington Field Office of the Secret Service, that he had that day attended a meeting sponsored by the W. E. B. DuBois Club at the Sylvan Theater, that the main topic of the meeting was police brutality, and that a person present had said:

> "They always holler at us to get an education, and now that I have already received my draft classification as 1-A and gotta report this Monday coming for my physical, I'm not going. If they ever make me carry a rifle, the first man I want to get in my sights is L. B. J. They're not going to make me kill my black brothers." (D. Ex. 2, pp. 13-15.)

Geiglein passed this information on to Secret Service Agent Giannoules (Tr. 12). The next day Giannoules and fellow Agent Scott went to the Sylvan Theater and met Freeburger and Shoemaker (Tr. 13, 18, 19-20). Shoemaker there told the Secret Service Agents that on the previous day he had heard appellant say, "substantially," that, "If they ever make me carry a rifle, the first person I want to get at the end of the sights is L. B. J." (D. Ex. 2, pp. 21-22.)

Freeburger and Shoemaker pointed out appellant on the grounds of the Sylvan Theater (D. Ex. 2, pp. 18-19). The Secret Service Agents thereupon arrested appellant, informing him that he was under arrest for a violation of "871 of the U. S. Code . . . concerning threatening the life of the President" (D. Ex. 2, p. 9). No arrest warrant had been obtained (D. Ex. 2, pp. 5-6).

The Agents took appellant to the Washington Field Office and searched him. They found on his person what appeared to be a small quantity of marijuana and a package of cigarette wrapper paper. (D. Ex. 2, pp. 6-7).

An information was filed in the District of Columbia Court of General Sessions charging appellant with possession of marijuana. The parties were the same as in this case -- the United States and Robert Watts. (D. Exs. 2 and 3.) Appellant filed a motion in this court to suppress the objects seized from his person by the Secret Service, claiming that the arrest and search were illegal because the arresting officers did not have reasonable grounds to believe that appellant had committed a felony[1/] (D. Ex. 3; D. Ex. 2, pp. 1, 31-32).

The motion was heard before Judge Beard on October 28, 1966 (D. Ex. 2). Agent Scott, called as a witness, testified to the information, described above, received by the Secret Service from Freeburger and Shoemaker, and to the circumstances of the arrest, the search and the seizure (D. Ex. 2, pp. 3-29).

Judge Beard granted the motion to suppress (D. Ex. 2, pp. 57-61; D.

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1. Secret Service agents "are authorized to make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony." 18 U. S. Code §3056. Of course, if the arrest was made without probable cause, it was also invalid under the Fourth Amendment.

Ex. 3). He ruled that the information received by the arresting officers from Freeburger and Shoemaker failed to show that appellant had made a threat against the President; that the arresting officers therefore did not have reasonable ground to believe that appellant had committed a felony; and that accordingly the arrest was illegal (D. Ex. 2, pp. 43-49, 51, 53, 57).

The government moved for reconsideration of Judge Beard's order. On November 18, 1966, Judge Beard denied the motion. On December 14, 1966, the government nol prossed the marijuana information. (D. Ex. 3.)

## STATUTE INVOLVED

18 U. S. Code §871(a) provides:

> "(a) Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice-President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice-President or other officer next in the line of succession to the office of President, or Vice President-elect, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

## STATEMENT OF POINTS

The trial court erred in denying appellant's motions for judgment of acquittal because:

1. The evidence was insufficient to support a jury finding that appellant uttered a threat against the President;

2. Appellant's conviction violated the First Amendment;

3. A conviction was precluded by a prior judicial determination, operating as a collateral estoppel, that what the government's witnesses had heard appellant say was not a threat.

## SUMMARY OF ARGUMENT

### I.

The evidence does not support the jury's finding that appellant uttered a threat against the President.

By definition, a threat is an expression of an intention to inflict injury. A mere expression of desire or hope to inflict injury is not a threat.

The words attributed to appellant by the three witnesses who testified to his remarks were only expressions of desire -- "I want," "I would want," "I would like," "I would rather." Moreover, they could not reasonably be construed as a genuine proposal to do harm because they were expressly conditioned on an undesired, hypothetical situation which could not occur without appellant's cooperation. Hence, even if appellant had used words of intention, the expression of intent would have been simultaneously negated by the stated condition.

Neither the setting -- an open, public, peaceable meeting -- nor any accompanying acts supplied to appellant's words a menacing significance beyond their literal meaning.

II.

Appellant's remarks conveyed an idea. They were not mere epithets or insults, "fighting words." The remarks were therefore within the area protected by the First Amendment. Since the statute is a direct restriction of speech, it could validly be applied to punish appellant for his remarks only if they posed a clear and present danger of a substantive evil.

Appellant's remarks did not in fact stimulate or produce any unlawful or harmful action, nor were they reasonably likely to do so. Accordingly, the clear and present danger test was not satisfied.

III.

Prior to appellant's trial, Judge Beard had determined, in granting appellant's motion to suppress in the marijuana prosecution, that what Freeburger and Shoemaker had heard appellant say was not a threat in violation of §871. Under the doctrine of collateral estoppel, Judge Beard's determination was conclusive of the same issue in this case. Hence the jury should not have been allowed to find from Freeburger;s and Shoemaker's testimony that appellant had made a threat.

The elements of collateral estoppel were satisfied. The parties in both cases were the same. Judge Beard determined an important issue of mixed fact and law which was the same in both cases. The issue was litigated before Judge Beard, and his determination was essential to his decision of the motion to suppress. The finality element was satisfied by the government's dismissal of the marijuana information following Judge Beard's ruling.

Judge Gasch's denial of the motion to dismiss the indictment is irrelevant. Judge Gasch's ruling could not create a collateral estoppel because it was a pure determination of law; the oral argument of the motion was not "litigation" of a factual issue; the proceeding in which the ruling was made was not, and still is not, final; and the legal issue before Judge Gasch was not the same as that involved in Judge Beard's determination.

## ARGUMENT

### I. The evidence was insufficient to support the jury's finding that appellant uttered a threat against the President.

(With respect to this point, appellant desires the Court to read pages 15-26, 29-38, 54-111, of the trial transcript.)

As used in 18 U. S. Code §871, and by dictionary definition, a "threat" is an expression of determination or intention to inflict

injury. An expression of no more than a desire or hope to injure is not a threat within §871. United States v. Daulong, 60 F. Supp. 235 (E.D. La.); United States v. Marino, 148 F. Supp. 75 (N.D. Ill.); Michaud v. United States, 250 F. 2d 131 (10th Cir.).

The distinction between a threat and a wish is sensible, and necessary to avoid the imposition of criminal sanctions for commonplace hyperbole. The wife who has said she would like to shoot her husband, the man who has said he would like to rob a bank, the economic conservative who wished perdition to President Roosevelt, have not uttered threats to commit unlawful action.

The trial court correctly instructed the jury that "a threat is a declaration of intention to injure another by the commission of an unlawful act," and, "A declaration of a mere desire to injure is not a threat" (Tr. 146). But the trial court erred in allowing the case to go to the jury because the evidence supplies no basis for finding that appellant's utterances satisfied the definition. This appears from appellant's language and the setting in which the language was spoken.

The language

The differences in the three versions of appellant's remarks are inconsequential. By each version, appellant merely stated a desire, not an intention. According to Freeburger, appellant said that "the first person I want to get in my sights is L. B. J." According to Shoemaker,

appellant said either "I would want" or "I would like to have" "L. B. J." "in the sights at the end of the barrel." According to Wieghart, appellant said he "would rather look down a rifle aimed at the President." "Want," "would want," "would like to have," "would rather," are all expressions of mere desire, as contrasted to such expressions of intent as "will," "am going to," or "intend to."

Appellant's words were further removed from any reasonable construction as a genuine threat because they conditioned his expressed desire on a hypothetical situation which he simultaneously indicated he did not desire and would resist, and the occurrence of which required his cooperation. Appellant stated that he would not report for induction (Freeburger's version) or that he would not serve in the military service (Shoemaker's version). His refusals could be punished, but they would still prevent induction or service -- the condition to fulfillment of his expressed desire.

Conditional threats can be within the statute's condemnation. But it depends on the condition. If some one says, "I will shoot the President if he devalues the dollar," he has obviously made a threat within §871. For the condition is, so far as the speaker and auditor are aware, possible of fulfillment. And though occurrence of the condition is undesired, it does not require the speaker's cooperation. On the other hand, there is obviously no threat when the menace is conditioned on a manifestly impossible or fictitious situation -- as "I would punch the President if I were ten feet tall."

This analysis is supported by the cases on assault. At common law, an assault is a threat by gesture. Yet if an otherwise menacing gesture is accompanied by language which negates an intention to act, there is no actual threat and hence no assault. Generations of law students have been raised on Turberville v. Savage, 1 Mod. 3 (K. B.), in which the defendant laid his hand on his sword and said, "If it were not assize-time, I would not take such language from you." Since it was assize time, the court held that there was no assault.

Similarly, it was held that there was no assault when a defendant raised his hand as if to strike and said, "If it were not for your gray hairs I would tear your heart out." Commonwealth v. Eyre, 1 Sarg. & R. 347 (Pa.). Nor was it an assault when a defendant shook his whip and said, "Were you not an old man, I would knock you down." State v. Crow, 23 N. C. (1 Ired. L.) 375.

So in the present case, the eventuality was negatived by the stated condition -- an occurrence which the speaker could prevent and which he declared he would prevent. Accordingly, even if appellant's remarks had been expressed in terms of intention rather than desire, they still would not have constituted a threat because they could not, in the light of the expressed condition, be reasonably construed as a genuine assertion of a purpose to inflict injury.

The setting

Of course, language can have a connotation beyond its literal meaning because of the circumstances under which it is spoken. But the setting here could give appellant's speech no sinister significance not apparent from the words themselves. Appellant was not speaking at a closed, conspiratorial meeting; he was not carrying a weapon; neither he nor anybody else engaged in actions indicating a dangerous design. To the contrary, appellant spoke at a peaceable, open-air meeting on public grounds, attended by any one who cared to do so, including the police and the press. His remarks were greeted only by laughter and applause. Neither he nor others in the group left their places, and the meeting continued with further discussion of its topic, police brutality. There is no evidence that either appellant or any of his listeners understood his remarks as a genuine threat,[2/] and any such understanding would have been unreasonable in view of the words used in the circumstances.

II. Appellant's conviction violated the First Amendment.

There are a few, narrow classes of speech, including one called "fighting words," which are not within the area protected by the First

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2. The trial court struck Wieghart's testimony that "I didn't think there was a threat" (Tr. 110). Because the court suspended sentence, we are not asserting errors which might only result in subjecting appellant to a new trial and hazard of resentencing.

Amendment because they do not communicate ideas and by their very utterance tend to incite immediate breach of the peace. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72.

Appellant's remarks were not in the unprotected "fighting words" category. The remarks were not mere epithets, nor were they insults addressed to his auditors. See Cantwell v. Connecticut, 310 U.S. 296, 309-10. Appellant was stating in crude and incomplete form an idea, one which Shoemaker, at least, captured. This idea was that it was wrong for Negroes to kill their "black brothers," the Vietnamese, because their real grievance was against the white Establishment at home, personified by the President. The idea is the same as that articulated in more developed and refined form in the SNCC statement held protected by the First Amendment in Bond v. Floyd, 385 U.S. 116.

The fact that appellant expressed his idea in a way that many may consider offensive does not eliminate the need of satisfying First Amendment limitations before the expression can be punished. Terminiello v. Chicago, 337 U.S. 1; Feiner v. New York, 340 U.S. 315.

The statute, if it applies, is manifestly a direct restriction upon speech, imposed because of the consequences feared from the prohibited language. Accordingly, the statute can be validly applied to speech within the First Amendment area only if the prohibited speech poses a clear and present danger of a substantive evil which Congress has power to prevent. American Communications Association v. Douds, 339 U.S. 382,

396; Dennis v. United States, 341 U.S. 494, 507-08. In its most recent formulation by the Supreme Court, the clear and present test prescribes "that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." Wood v. Georgia, 370 U.S. 375, 384 (emphasis added).

The clear and present danger test was obviously not satisfied here. Appellant did not urge his listeners to engage in any unlawful action, and the First Amendment requires the making of a "distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken." Yates v. United States, 354 U.S. 298, 322. Appellant's remarks did not stimulate or prompt any harmful action. And so far from creating a situation in which the "degree of imminence" of harmful action was "extremely high," the publicly-made remarks were thoroughly unlikely to cause any action at all. No one moved, or could have been reasonably expected to move, toward the White House for the purpose of attacking the President. No breach of the peace ensued or was reasonably predictable. The innocuousness of appellant's remarks is confirmed by the failure of detective Shoemaker and Army investigator Freeburger to arrest him on the spot.

III. A judgment of acquittal was required by Judge Beard's prior determination, operating as a collateral estoppel, that what the government witnesses had heard appellant say was not a threat.

(With respect to this point, appellant desires the Court to read Defendant's Exhibits 2 and 3.)

Appellant's conviction rests on the jury's finding that what Freeburger and Shoemaker heard him say at the Sylvan Theater on August 27, 1966, was a threat under §871. Prior to the trial of this case, however, Judge Beard in the Court of General Sessions had already made a judicial determination, in deciding the motion to suppress the marijuana prosecution, that what Freeburger and Shoemaker had heard was not a threat in violation of §871, and hence did not supply probable cause for appellant's arrest. Under the doctrine of collateral estoppel, Judge Beard's determination was conclusive for the purposes of this case. Hence the trial court erred in denying appellant's motion for a judgment of acquittal and thereby allowing the jury to make a finding contrary to Judge Beard's determination.

The doctrine of collateral estoppel applies in criminal as well as civil cases. Sealfon v. United States, 332 U.S. 575; Laughlin v. United States, 120 U.S. App. D.C. 93, 344 F. 2d 187. "That doctrine makes conclusive in subsequent proceedings only determinations of fact, and mixed fact and law, that were essential to the decision." Yates v. United States, 354 U.S. 298, 336. "To invoke that doctrine, however,

a party must show that an important issue of fact has been previously litigated by the same parties and resolved by final judgment in the prior litigation." Moore v. United States, 120 U.S. App. D.C. 173, 344 F. 2d 558, 559. Prerequisites to application of the doctrine are "full litigation and final determination." Laughlin v. United States, supra, 344 F. 2d at 190.

These quotations indicate the elements of collateral estoppel, all of which were met here. The parties in both cases were the same -- the United States and Robert Watts. Judge Beard determined an issue of mixed fact and law -- whether what Freeburger and Shoemaker heard appellant say was a threat under §871. This issue was the same as that on which estoppel was sought in this case. The issue was litigated before Judge Beard in an evidentiary hearing followed by argument and reargument. The issue was important in both cases, being the crux of this case and decisive of the government's ability to proceed in the marijuana case. Judge Beard's resolution of the issue was essential to his decision of the motion to suppress. Cf. Laughlin v. United States, supra, 344 F. 2d at 190, in which the essentiality element was held satisfied by the fact that the determination of the issue of mixed fact and law (there, whether a consent was coerced) was essential to disposition of a motion to dismiss the indictment.

As for the prerequisite of finality, that was met by the government's dismissal of the information, which terminated the marijuana

prosecution. Laughlin v. United States, supra, makes it clear that the finality requirement is satisfied even if the litigation is terminated by a ruling subsequent to that which immediately ensued from the estopping factual determination. In Laughlin, the estopping determination was made by Judge Youngdahl and resulted in his declaring a mistrial; the finality element was achieved by Judge Curran's subsequent dismissal of the indictment. See 344 F. 2d at 190. That finality derives from the ultimate disposition of the case is also recognized in United States v. Kramer, 289 F. 2d 909, 913 (2d Cir.), which refers to collateral estoppel as a principle which "operates, following a final judgment, to establish conclusively a matter of fact or law for the purposes of a later law suit on a different cause of action between the parties to the original action" (emphasis added).

It is of no consequence that the "final judgment" in this case was a dismissal of the marijuana information by the government rather than, as in Laughlin, a dismissal by the court. The government dismissed because it was impossible for it to proceed following the granting of the motion to suppress.

The obvious purpose of the finality requirement is to insure that a conclusive effect not be given to a judicial determination of fact which is still tentative in the litigation in which it was made because that litigation has not been conclusively ended. For the purposes of collateral estoppel, "finality" is a flexible concept, determined

by practical, not technical, considerations. Zdanok v. Glidden Co., 327 F. 2d 944, 955 (2d Cir.).

Once the marijuana information was dismissed by the government, Judge Beard's determination of fact could not be changed in that prosecution. If the government could -- which we doubt -- reissue a new and identical information, Judge Beard's determination could not be reexamined in the renewed prosecution, since it would be res judicata. United States v. Oppenheimer, 242 U.S. 85; Steele v. United States, No. 2, 267 U.S. 505. To treat the marijuana prosecution as "finally" terminated thus satisfies the purpose of the finality requirement and accords with the practicalities of the situation.

In Laughlin the Court mentioned (344 F. 2d at 191) that the government had the right to appeal the order which made the first case final by dismissing the indictment. Here the government could not appeal Judge Beard's ruling granting the motion to suppress, nor could it appeal its own dismissal of the indictment. This distinction is of no consequence, since a right to appeal is not a prerequisite to collateral estoppel. This is proved by the fact that a factual determination made by a verdict of acquittal in a criminal case operates as a collateral estoppel on the same issue in a subsequent criminal case. Sealfon v. United States, 332 U.S. 575; United States v. Kramer, supra. Yet the government cannot, of course, appeal an acquittal.

At the trial of this case, the only indication of Judge Matthews'

reason for refusing to give collateral estoppel effect to Judge Beard's determination was her observation that Judge Gasch had denied appellant's motion to dismiss the indictment (Tr. 90-91). The relevancy of Judge Gasch's ruling escapes us.

Certainly it cannot be supposed that Judge Gasch's ruling should have collaterally estopped Judge Beard. The ruling failed to satisfy the collateral estoppel doctrine on several grounds. First, it was a pure determination of law -- whether the indictment alleged an offense -- not a determination of fact or mixed fact and law. Second, argument of the motion was not "litigation" of a factual issue. Third, the proceeding in which Judge Gasch's ruling was made had not become final prior to Judge Beard's determination, and indeed is still not final because of the pendency of this appeal. Fourth, the legal issue before Judge Gasch was not the same as that involved in Judge Beard's mixed fact and law determination. All Judge Gasch had before him was the bare indictment. The indictment was presumptively valid and was required to be upheld if by any reasonable construction it could be said to state an offense. United States v. Debrow, 346 U.S. 374; Byers v. United States, 175 F. 2d 654, 656 (10th Cir.). The indictment contained only one sentence of appellant's remarks, and that sentence conceivably could have been a threat if expressed under circumstances and in a setting which gave it a sinister coloration. All Judge Gasch ruled, therefore, was that the government should have an opportunity to prove

that the sentence, in context, was a threat. The indictment did not reveal that there was no sinister context and that the government's proof would consist entirely of the testimony of Freeburger and Shoemaker. In short, Judge Gasch did not rule, as did Judge Beard, on the question of whether the accounts of Freeburger and Shoemaker established the utterance of a threat in violation of §871.

By disregarding Judge Beard's determination, Judge Matthews permitted the jury to find guilt beyond a reasonable doubt on the same facts which a judge of a court of record had already found did not even supply probable cause for an arrest. Judge Matthews did this, furthermore, in a case in which the government sought with excessive zeal to make a felony out of a crude, but trivial and innocuous, remark of an 18-year-old youth. The denial of appellant's motions for judgments of acquittal was not only bad law. It was also offensive to considerations of justice and the spirit of the constitutional prohibition of double jeopardy. 3/

## CONCLUSION

The judgment below should be reversed with directions for the entry of a judgment of acquittal.

Respectfully submitted,

Joseph Forer
711 14th St. N.W.
Washington, D.C. 20005
Attorney for Appellant
(Appointed by this Court)

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3. "Collateral estoppel in criminal cases is influenced by the policy forbidding repeated criminal prosecutions, by 'the State with all its resources and power,' which underlies the constitutional protection against double jeopardy." Laughlin v. United States, supra, 344 F. 2d at 189-90, n. 10.

BRIEF FOR APPELLEE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21,528

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ROBERT WATTS, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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**Appeal from the United States District Court for the District of Columbia**



DAVID G. BRESS,
*United States Attorney.*

FRANK Q. NEBEKER,
VICTOR W. CAPUTY,
LEE A. FREEMAN, JR.,
*Assistant United States Attorneys.*

Cr. No. 1058-66

## QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1) Was there sufficient evidence to sustain appellant's conviction for making threats against the life of the President of the United States?

2) Was the appellant's conviction precluded by another judge's ruling—on a motion to suppress marijuana in a separate misdemeanor prosecution—that appellant was arrested without probable cause to believe that he had threatened the life of the President?

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Cases—Continued



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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21,528

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ROBERT WATTS, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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**Appeal from the United States District Court for the District of Columbia**

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## BRIEF FOR APPELLEE

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### COUNTERSTATEMENT OF THE CASE

On August 28, 1966, appellant was arrested for making a threat against the life of the President of the United States. The next day he received a preliminary hearing before Judge Neilson of the District of Columbia Court of General Sessions, who ordered appellant held for the action of the grand jury. On September 12, 1966, the grand jury returned an indictment charging that appellant "knowingly and willfully, and in the presence of Paul Freeburger and Carroll Shoemaker, did make an oral threat to take the life of, and to inflict bodily harm upon the President of the United States in the verbal use of

threatening language substantially as follows, that is: 'If they ever make me carry a rifle, the first man I want to get in the sights of the barrel is LBJ.'" [1]

The appellant sought to dismiss the indictment on the ground that it failed to allege a violation of the statute. Judge Gasch denied this motion on October 7, 1966. A jury trial before Judge Matthews resulted in appellant's conviction for threatening the life of the President. The court suspended imposition of sentence, and placed him on probation for four years. This appeal ensued.

**The facts**

On August 27, 1966, the W.E.B. DuBois Club held a "rally" on the Washington Monument grounds, which consisted of several group discussions. The appellant participated in a discussion of police brutality with approximately twenty-five other persons (Tr. 19). Members of the group described incidents where they had seen people "treated inhumanely by the police," and accompanied their observations with comments "such as we should have taken their nightsticks away from them and used them on the police." (Tr. 22). One individual suggested that the group should get more information before dealing with police brutality. In response to these remarks, the appellant raised his hand and stated:

> "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first person I want [or would want] to get in my sights is L.B.J. They are not going to make me kill my black brothers." (Tr. 22, 35, 61).

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[1] When arrested, appellant had a quantity of marijuana on his person. An information was filed charging him with a separate misdemeanor. But this case was abandoned after Judge Beard of the Court of General Sessions, on October 28, 1966, suppressed the marijuana as the fruit of an illegal arrest and search.

When he made this threat, the appellant gestured "as if he were looking down the sights of a rifle." (Tr. 70). His assertion brought forth laughter and applause from the people assembled (Tr. 36).

## STATUTE INVOLVED

Title 18, United States Code, Section 871 (1966), provides:

> (a) Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

## SUMMARY OF ARGUMENT

In the midst of a meeting to discuss police brutality, the appellant declared that if he were forced to serve in the armed forces, the first person he wanted in the sights of his rifle was LBJ. The jury, with faultless instructions from the trial court, concluded that this statement constituted a threat against the life of President Johnson. The plain import of those words required that the issue of appellant's guilt be settled by the jury. The decisions which have construed § 871 devastate any argument that the evidence was not sufficient to support the verdict. Therefore, the appellant's conviction must be affirmed.

No collateral estoppel attaches to the ruling of another judge—in a separate misdemeanor case—that there was no probable cause for appellant's arrest. Since that ruling was not final, and could not be appealed, it scarcely binds the prosecution. Moreover, the question of probable cause is distinct from the issue of guilt that was resolved at trial.

## ARGUMENT

### I. There was ample evidence to support the jury's verdict of guilty.

(Tr. 146)

According to the testimony accepted by the jury, appellant stated, in substance, that if he were forced to serve in the armed forces the first person he wanted to get in the sights of his rifle was President Johnson.[2] The evidence further showed that appellant made this assertion to a group of people discussing police brutality, and accompanied it with the gesture of aiming a rifle.

Under the statute and applicable case law, the issue whether appellant's words amounted to an unlawful threat could only be resolved by the jury. The trial judge instructed the jury that "a threat is a declaration of intention to injure another by the commission of an unlawful act," (Tr. 146), and that, in applying this definition, the jury should consider the appellant's manner and the context of his remarks. Defense counsel sought to convince the jury that appellant expressed only a desire, not an intention, to kill the President. Having lost before the jury, counsel now contends that appellant's words did not convey a threat as a matter of law. Unfortunately, this argument directly contradicts a long and unbroken line of decisions that have interpreted § 871.

The review of appellant's conviction must proceed with appreciation that the "statute under consideration is as

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[2] It is not disputed that the initials "LBJ" referred to President Johnson. Compare *United States* v. *Marino*, 148 F.Supp. 75 (N.D. Ill. 1957).

unique as it is forceful." *United States* v. *Stickrath*, 242 Fed. 151, 153 (S.D. Ohio 1917). As noted in that opinion:

> "The statute in question was enacted, not only for the protection of the President, as the representative and chosen chief executive of the nation, but also to preserve the tranquility of the people and their peace of mind. Its passage came at a time when this country was about to be driven into and to engage in an epoch-making and substantially world-wide war, participation in which it had earnestly sought to avoid. It was then known that there were some who, on account of erratic tendencies, or mistaken views, . . . might by threats assail the President, and thereby inspire others to attempt his life, if they themselves should not undertake the commission of that crime. The enactment was opportune, not only on account of our past record of three presidential assassinations and the peculiar stress to which the country was about to be subject, but that there might hereafter be a deterrent to restrain the disloyal, erratic, misguided or wickedly disposed."

The law forbids threats "calculated to breed disloyalty or hostility in the community to the constituted authorities and incite a spirit of unrest and sedition." *United States* v. *Stobo*, 251 Fed. 689, 691 (D.Del. 1918). Consequently, the statute has been strictly enforced against any expression of intent or purpose to harm the President.

### A. *The plain meaning of appellant's words constituted a threat within the meaning of § 871.*

It has been held, without exception, that words almost identical to those voiced by appellant convey a threat against the life of the President.[3] For instance, *Ragansky*

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[3] The cases cited by appellant may be readily distinguished on their facts. In *United States* v. *Daulong*, 60 F. Supp. 235 (W.D. La. 1945), the court held that words such as "had a notion" and "felt like" did not express intent or determination. In *United States* v. *Marino*, 148 F. Supp. 75, 77 (N.D. Ill. 1957), the accused had

v. *United States*, 253 Fed. 643, 644 (7th Cir. 1918), affirmed a verdict that the following language violated § 871:

> "I *would like to* make a bomb big enough to blow up the Capital and President and all the Senators and everybody in it."
>
> "We *ought to make* the biggest bomb in the world and take it down to the White House and put it on the dome and blow up President Wilson . . . ." (emphasis added).

And *Clark* v. *United States*, 250 Fed. 449 (5th Cir. 1918), likewise refused to disturb a conviction for saying:

> "Wilson is a wooden-headed son of a bitch. I *wish* Wilson was in hell, and if I had the power I would put him there." (emphasis added).

Rulings upon the sufficiency of indictments for making threats against the life of the President further emphasize the expansive statutory coverage. The trial court in *United States* v. *Stobo*, *supra*, at 694, overruled a demurrer to an indictment charging that the accused said "the President ought to be shot and *I would like* to be the one to do it." (emphasis added) Although the statute prohibits the expression of just such words as were spoken by the appellant, counsel argues that the tenor of the entire statement and the attendant circumstances emasculated appellant's threat. The law is otherwise.

### B. *The appellant possessed the requisite intent when he voiced his threat.*

In an effort to excuse his threat, appellant insists that he did not speak in earnest, as supposedly evidenced by the fact that his words did not incite his audience to

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posted a paper saying, "There can be slain no sacrifice to God more acceptable than an unjust President." Of course, the court held that this conduct did not constitute a criminal offense, and reasoned: "There is in the quoted words no expression of intent on the part of the defendant to injure the President or anyone else, or in fact to do anything whatsoever."

immediate violence.[4] But "one who makes threats against the President cannot shield himself by a plea that the words were uttered lightly and without intent to do bodily harm. It is the making of the threat, not the intent to carry it out, that violates the satute." *Pierce* v. *United States*, 365 F.2d 292, 294 (10th Cir. 1966). The "offense denounced by the statute is completed at the instant the unlawful threat is knowingly and willfully made." *United States* v. *Stickrath*, *supra*, at 154. "By inserting the words 'knowingly and willfully' in the statute, Congress was referring to the intentional nature of the threat." *Michaud* v. *United States*, 350 F.2d 131, 133 (10th Cir. 1965). Such threats are knowing and willful if "the maker voluntarily and intentionally utters them as the declaration of an *apparent* determination to carry them into execution." *Ragansky* v. *United States*, *supra*, at 644. In short, the statute requires no proof that appellant actually intended to implement his threat, or that he meant to influence his listeners by the threat.

Indeed, two recent convictions for threatening the life of the President arose from circumstances that parallel appellant's case. In *Pierce* v. *United States*, *supra*, the accused was arrested for being absent without leave from the armed forces. While confined, he wrote on a piece of paper:

> "I Ray Dan Pierce hearby being of sound mind & body do hearby swear to kill the President of the United States of America the first chance I get."

Then he addressed it, "Dear Mr. Johnson," and wrote across the bottom of the page: "and by the way send me $100.00 for cigarette money." The Court of Appeals held that this conduct represented a threat against the life of the President, expressly rejecting the defense that the words were rendered innocuous because the whole matter was a joke between the accused and his drunken cellmate.

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[4] Of course, this argument ignores the fact that just prior to appellant's threat other persons had advocated violent resistance to law enforcement measures. See *Reid* v. *United States*, 136 F.2d 476 (5th Cir. 1943).

The other case in point, *Rothering* v. *United States*, 384 F.2d 385 (10th Cir. 1967), affirmed the conviction of a person who said that he wanted to go to jail, that he would commit crimes and rob people for that purpose, and that "if that didn't do any good, 'I will kill the President if it is necessary.'" The Court of Appeals held that "the claim of exaggeration" posed no defense to a prosecution under § 871, giving short shrift to appellant's contention that the trial court erred by rejecting his offer "to prove by a professor of English that the words used did not constitute a threat because they were in the nature of a hyperbole and were not intended to be taken literally." [5]

### C. *The conditional nature of appellant's threat does not remove it from the ambit of* § 871.

The statute "denounces a threat, and does not distinquish between an absolute threat and one which is conditional. A threat is a threat whether conditional or absolute, and may have an equally sinister effect upon the minds of those hearing it." *United States* v. *Stobo*, *supra*, at 694. As stressed in *United States* v. *Jasick*, 252 Fed. 931, 933 (E.D. Mich. 1918): "The mere fact that this threat was expressly made conditional upon the ability of the defendant to carry it out does not . . . render the same any less a threat." [6]

In this instance, the condition placed on the threat was an imminent possibility. The appellant had been classi-

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[5] The appellant belatedly contends that his threat should be afforded constitutional protection because it stemmed from a belief that Negroes should not fight for this country. But the appellant was convicted for making threats against the life of the President, not for expressing political opposition to the war in Vietnam. *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942). Moreover, the motive which prompted his utterance is immaterial. *United States* v. *Stickrath*, *supra*, at 155.

[6] Applying this principle, the court sustained an indictment which alleged that the accused said "if he could get to President Wilson he would shoot the blinded eye" and that "if he got a chance he would shoot President Wilson."

fied 1-A by his local draft board, and commanded to report for a physical examination. Notwithstanding appellant's unwillingness to be inducted, his threat displayed an awareness that he could be forced by law to serve in the armed forces. Not only did appellant condition his threat upon a circumstance which he could expect to occur in the near future, but the prospect of being compelled to join the armed forces instilled him with malice toward the President. This attitude hardly excuses the threat that he voiced against the life of the President.

**II. The trial judge correctly held that a ruling upon a motion to suppress narcotics in a separate case did not collaterally estop the prosecution of appellant for his threat upon the life of the President.**

Prior to trial for violation of § 871, appellant attacked his indictment for failure to allege a criminal offense, arguing that his words expressed merely an attenuated desire to kill the President. Judge Gasch correctly denied this motion to dismiss the indictment. Thereafter, in a separate misdemeanor prosecution arising from appellant's possession of marijuana when arrested, counsel renewed his contention that appellant's words did not amount to a threat within the statutory definition. Despite the judicial decision sustaining the indictment, Judge Beard suppressed evidence as to the seizure of the marijuana on the ground that appellant's utterance of the threat did not furnish probable cause for his arrest.[7] Against this background, the repeated effort to raise Judge Beard's ruling as a bar to appellant's conviction for violation of § 871 verges on the frivolous. Only brief refutation is warranted.

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[7] It should be noted that Judge Neilson had already decided this precise issue to the contrary.

### A. *Due to its lack of finality, preliminary suppression of the marijuana in the misdemeanor proceeding has absolutely no bearing upon this case.*

Since neither party may appeal from a ruling on a motion to suppress, *DiBella* v. *United States*, 369 U.S. 121, 130-131 (1962), such a ruling creates no "collateral estoppel" in a subsequent proceeding. *United States* v. *Physic*, 175 F.2d 338 (2d Cir. 1949).[8] There must be "full litigation and final determination" to justify the application of "collateral estoppel". The prosecution may not be bound by an interlocutory "order not subject to review." *Laughlin* v. *United States*, 120 U.S. App. D.C. 93, 97, 344 F.2d 187, 191 (1965). In this instance, the prosecution had no means to challenge the inferior judge's suppression of the marijuana. That order was "not final and independently appealable." Accordingly, the defense of "collateral estoppel" has no place in this appellant's arsenal. *Nelson* v. *United States*, 93 U.S. App. D.C. 14, 25-26, 208 F.2d 505, 516-517 (1954); *Horner* v. *Ferron*, 362 F.2d 224 (9th Cir.), *cert. denied*, 385 U.S. 958 (1966).

### B. *In any event, a preliminary determination as to lack of probable cause concerned a different issue than appellant's criminal responsibility for threatening the life of the President.*

The suppression of the marijuana rested upon the misdemeanor judge's opinion that law enforcement officers lacked probable cause to arrest and search appellant because his words did not constitute a threat. This legal conclusion carries no greater collateral weight than a ruling by the committing magistrate at a preliminary hearing. And a magistrate's finding of insufficient evi-

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[8] Indeed, the prosecution might again seek to introduce the evidence at the time of trial. *Anderson* v. *United States*, 122 U.S. App. D.C. 277, 279, 352 F.2d 945, 947 (1965); *United States* v. *Williams*, 227 F.2d 149 (4th Cir. 1955). "The avoidance of miscarriage of justice cuts both ways." *Robinson* v. *United States*, 284 F.2d 775, 776 (5th Cir. 1960).

dence to hold an accused for action of the grand jury does not prevent the subsequent prosecution of the accused for the offense giving rise to the preliminary hearing. *United States ex rel. Rutz* v. *Levy*, 268 U.S. 390, 393 (1925); *Wampler* v. *Warden of the Maryland Penitentiary*, 218 F. Supp. 876 (D.C. Md. 1963).[9] Inasmuch as Judge Beard performed a function almost identical to that of a committing magistrate, ostensibly applying the same legal standards to the determination of probable cause, his invalidation of appellant's arrest certainly does not foreclose the issue of appellant's guilt. *Cf. United States* v. *Malfetti*, 213 F.2d 728, 730 (3d Cir. 1954).[10]

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[9] *United States ex rel. Greenberg* v. *Epstein*, 33 F.2d 128, 129 (E.D.N.Y. 1929).

[10] Since Judge Beard held that the undisputed facts showed there was no probable cause to believe that appellant had uttered threats as a matter of law, the appellant's reliance upon the doctrine of "collateral estoppel" is widely misplaced. *Yates* v. *United States*, 354 U.S. 298, 336, 338 (1957); *Moore* v. *United States*, 120 U.S. App. D.C. 173, 174, 344 F.2d 558, 559 (1965). By speaking in terms of "collateral estoppel," appellant labors to turn Judge Beard's legal ruling into a finding of fact, and thereby attach conclusive effect to that preliminary order. Semantics can obscure neither the actual basis for Judge's Beard's ruling, nor his error in refusing to respect Judge Gasch's prior decision that the indictment for violation of § 871 was legally sufficient. If a doctrine such as *res judicata* has any application to the present case, it should nullify Judge Beard's ill-considered ruling.

## CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
*United States Attorney.*

FRANK Q. NEBEKER,
VICTOR W. CAPUTY,
LEE A. FREEMAN, JR.,
*Assistant United States Attorneys.*

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REPLY BRIEF FOR APPELLANT

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UNITED STATES OF AMERICA,

Appellee

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Appeal from a Judgment of the United States District
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Joseph Forer
711 14th St. N. W.
Washington, D. C. 20005
Attorney for Appellant
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# REPLY BRIEF FOR APPELLANT

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## I. The Insufficiency of the Evidence.

The government cites some cases of World War I vintage* as holding that various wishful expressions constituted threats against the President.

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*These cases were decided before the first Supreme Court case under the First Amendment, Schenck v. United States, 249 U.S. 47, in which the clear and present danger test was first announced. The quaint language in some of the cases, including passages quoted by the government, reflects the view that speech can be punished if it might stimulate public disaffection for governmental authorities. The government ought to know, however, that this view is obsolete. By modern theory, "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." Terminiello v. Chicago, 337 U.S. 1, 4. Cf. Wood v. Georgia, 370 U.S. 375; Bond v. Floyd, 385 U.S. 116. We believe that the government has failed to cope with our constitutional argument, to which it devotes only an unresponsive footnote.

These cases stand for no more than the obvious proposition, stated in our principal brief (p. 14), that "Of course, language can have a connotation beyond its literal meaning because of the circumstances under which it is spoken." None of the government's cases dealt with the sufficiency of the evidence. They merely hold, as did Judge Gasch in refusing to dismiss the indictment in this case, that the government should be permitted to prove that language alleged to be a threat actually was one in the setting it was employed.

Thus in United States v. Stobo, 251 Fed. 689 (D. Del.), cited by the government, the court overruled a demurrer to an indictment charging that the accused had said that "the President ought to be shot and I would like to be the one to do it." The court did so on the grounds that it was not prepared to say that the alleged language could not conceivably be a threat under any circumstances. As the court stated (at 694), "the circumstances under which the words were uttered, the manner and tone of the utterance, what else was said on the occasion, and, in short, the res gestae, may or may not be determinative of the question whether they were intended to operate or operated as a threat."

Similarly, Clark v. United States, 250 Fed. 449 (5th Cir.), held only that a motion to quash an indictment was properly overruled. Moreover, that indictment did allege words of intent -- "if I had the power I would put him [President Wilson] there [in hell].

In Ragansky v. United States, 253 Fed. 643 (7th Cir.), the indictment contained three counts, each apparently alleging a part of a single speech. The government quotes the second and third counts, which alleged utterances couched in terms of desire, but conveniently omits the first count, which alleged an obvious declaration of intent ("I can make bombs and I will make bombs and blow up the President"). In any event, the sufficiency of the evidence was not questioned or considered in Ragansky; as the court pointed out (at 644), "the testimony is not preserved." Ragansky merely holds that if a threat is uttered, it is not a defense that the speaker did not intend to perform the threatened action.

In the present case, we are attacking not the indictment but the sufficiency of the evidence to prove that what appellant said was, or could rationally be construed by the jury to be, a threat -- that is, a declaration of intention to harm. The evidence here shows that (1) appellant's language was in terms nothing more than an expression of desire; (2) even this expression was divorced from reality, being conditioned on an undesired eventuality which appellant could, and said he would, prevent; and (3) nothing in the setting gave the language a menacing significance not apparent in the words themselves. Hence the evidence furnishes no basis for a jury finding of a threat.

The government asserts in footnote 4 of its Brief, "that just prior to appellant's threat other persons had advocated violent resistance to

law enforcement measures." The reference is to the following testimony of Freeburger (Tr. 21-22):

> "Q. Will you tell us what that discussion was concerning police brutality? A. The discussion was centered around various incidents which had been observed or taken part in by other members of the group in various cities throughout the United States concerning incidents of police brutality, times when people were treated inhumanely by the police. And these incidents were commented on by members of the groups with comments, such as we should have taken their nightsticks away from them and used them on the police, and we should have had a little better indication of what was going to happen; comments such as this."

The government thus misdescribes "incidents of police brutality, times when people were treated inhumanely by the police" as "law enforcement measures." Passing by this euphemism, nevertheless the outspoken comments relating to the police spoken by persons other than appellant cannot rationally supply a hidden meaning for remarks made by appellant which did not relate to the police.

The government misrepresents our position when it says that, "In an effort to excuse his threat, appellant insists that he did not speak in earnest. . . ." Then the government demolishes this straw man by arguing that it is not a defense to the utterance of threats that they were uttered in jest or without the intent of performance.

Our position is that there is no evidence that what appellant said was, on its face or in the setting, an expression of an intent to injure. Hence appellant's earnestness or lack of it is irrelevant. We also

contend that appellant's remarks were protected by the First Amendment and that/protection is not forfeited by the crude and allegorical style of his utterances.

## II. Collateral Estoppel

1. The government cites United States v. Physic, 175 F. 2d 338 (2d Cir.), for the proposition that no collateral estoppel can be created by a non-appealable determination. But the Second Circuit's 1949 decision in Physic is inconsistent with the Second Circuit's 1961 decision in United States v. Kramer, 289 F. 2d 909 (2d Cir.), and with Sealfon v. United States, 332 U.S. 575. Kramer and Sealfon gave collateral estoppel effect to judgments of acquittal, and such judgments cannot be appealed.

The government also cites Nelson v. United States, 93 U.S. App. D.C. 14, 208 F. 2d 505, which refused to give collateral estoppel effect, against a criminal defendant, to a ruling made in an independent proceeding brought by him to suppress evidence on the basis of which he was later indicted and convicted. Nelson is not controlling for two reasons. First, the question there was whether to apply collateral estoppel against the accused. As pointed out in Laughlin v. United States, 120 U.S. App. D.C. 93,96 , n. 11, 344 F. 2d 187, 190, n. 11:

> "We need not, of course, consider on this appeal whether the doctrine of collateral estoppel can be invoked by the

> Government against an accused. Suffice it to say now that such a case would quite obviously present different problems."

Secondly, the suppression-of-evidence proceeding in Nelson was, from any practical standpoint, merely an adjunct to the subsequent criminal case in which the estoppel question arose. And, of course, there never is any question of estoppel by a ruling in the same case in which the ruling was made.

Insofar as language in Nelson assumes that appealability is a prerequisite for collateral estoppel, the language should be disregarded in view of the Supreme Court's decision in the Sealfon case, supra.

It is irrelevant that Judge Beard's ruling was subject to change in the proceeding before him. In fact it was not changed, and the finality requirement was satisfied for collateral estoppel purposes when the proceeding itself was subsequently terminated. See our principal Brief, pp. 19-20. So in Laughlin v. United States, supra, the estopping determination was made by an interlocutory ruling granting a mistrial because of the erroneous admission of evidence.

2. The government claims that Judge Beard's determination did "not foreclose the issue of appellant's guilt" because it "concerned a different issue than appellant's criminal responsibility for threatening the life of the President."

The government's argument shows that it is confusing full scale

res judicata -- which, when it applies, forecloses relitigation of a case -- with collateral estoppel -- which, when it applies, forecloses only relitigation of an issue of fact or mixed fact and law in a case.

We never contended, nor do we have to contend, that Judge Beard's determination foreclosed the issue of appellant's guilt on the charge that he threatened the President. All Judge Beard's determination foreclosed was the issue of whether what Freeburger and Shoemaker had heard appellant say was a threat. Judge Beard's determination would not have precluded the government from proving that appellant was guilty because he had said something other than what Freeburger and Shoemaker had heard. The government, however, introduced no evidence to that effect.

3. It is pointless for the government to analogize Judge Beard's role to that of a committing magistrate and then to argue that a magistrate's finding of insufficient evidence to hold an accused for grand jury action does not bar a subsequent prosecution of the accused. The magistrate's hearing is a part of the same proceeding as the prosecution, and, as we have already pointed out, a ruling does not create an estoppel in the same proceeding in which it was made.

Moreover, the analogy is unsound. A commitment hearing is such an embryonic and sui generis judicial proceeding, that it is doubtful that the committing magistrate makes any determination of fact, as distinguished from a determination that there merely exists evidence of

potential guilt. Certainly it cannot be said that factual issues are fully litigated at a commitment hearing. Thus at a commitment hearing, the accused will be held to answer if the government introduces evidence of guilt even if the accused introduces convincing evidence that no crime was committed or that he has an alibi. By holding the accused, the magistrate does not make a finding that he credits the government's evidence over that of the accused.

For all these reasons, a ruling at a commitment hearing does not satisfy the prerequisites for collateral estoppel. In contrast, on a motion to suppress evidence, the judge must decide the facts and the facts are fully litigated.

Respectfully submitted,

Joseph Forer
Attorney for Appellant
(Appointed by this Court)